

STATE OF SOUTH CAROLINA
BEFORE THE PUBLIC SERVICE COMMISSION
DOCKET NO. 2019-281-S

IN RE:	)	<u>RESPONSE OF THE DEPARTMENT</u>
	)	<u>OF CONSUMER AFFAIRS TO</u>
	)	<u>PALMETTO UTILITY INC.'S</u>
Application of Palmetto Utilities, Inc. for	)	<u>MOTION TO STRIKE PORTIONS OF</u>
adjustment of rates and charges for, and	)	<u>THE PRE-FILED DIRECT</u>
modification to certain terms and conditions	)	<u>TESTIMONY AND EXHIBITS OF</u>
related to the provision of sewer service.	)	<u>CHARLES E. LOY, DANIEL P.</u>
	)	<u>HUNNELL, II, AND CHRISTINA L.</u>
	)	<u>SEALE AND FOR IMPOSITION OF</u>
	)	<u>SANCTIONS</u>

The South Carolina Department of Consumer Affairs (“Department”) submits this response to Palmetto Utilities, Inc.’s (the “Company”) Motion to Strike Portions of the Pre-Filed Testimony of certain Office of Regulatory Staff (“ORS”) witnesses.¹ To the extent the Motion seeks the striking of testimony as punishment for what the Company identifies as ORS’s alleged current and past transgressions, the Public Service Commission (“Commission”) should deny the Motion.

The Department submits this limited response to address three (3) primary matters. First, the only issue before the Commission should be whether the identified statements and exhibits are confidential or proprietary. Second, striking testimony and exhibits could unreasonably preclude evidence that may be useful to the Commission in its analysis of the case. Third, striking testimony under these circumstances in order to punish a party is an unprecedented and extreme remedy.

I. Determination of Confidentiality

As the Company notes, it submitted certain documents and information to ORS pursuant to S.C. Code §58-4-55. The Company first contends that the portions of the testimony referencing those documents should be struck “on the grounds that they were improperly disclosed to the

¹ The Company’s Motion also seeks sanctions against ORS; however, the Department submits this response only to address the Company’s request to strike portions of the ORS testimony.

Commission and public by ORS in violation of such statute.” However, no such ground exists in §58-4-55.

The only qualifying terms found in S.C. Code §58-4-55 relevant to the Commissions’ decision on the Company’s Motion are that that ORS “must treat the information as confidential or proprietary unless or until **the commission rules such information is not entitled to protection from public disclosure...**” and the Commission may “order the regulatory staff to file the documents or information with the commission under seal...” *See* S.C. Code §58-4-55(A) (Emphasis added).² Therefore, in this instance, the Commission should only consider whether the information is confidential or proprietary and whether the information should be placed under seal. In its Motion, the Company does not assert the information is confidential or proprietary, but rather only that it is such as a matter of law pursuant to the section. Upon a basic reading of the unredacted statements the Company wishes to strike, it is evident they are neither confidential nor proprietary.

II. Development of a Fair and Complete Record

The Company next argues “the Commission may also preclude the introduction of evidence under R.103-846 and Rule 37(b)(2)(B), SCRCP.” This argument is flawed for several reasons. First, while repeatedly pointing out that document production under S.C. Code §58-4-55 is not discovery, the Company suggests discovery rule SCRCP Rule 37(b)(2)(B) could be used to preclude the introduction of the materials; however, this rule only applies when a party fails to

² Interestingly, §58-4-55 does not provide any explicit procedure by which ORS or any other party or intervenor could request such a ruling from the Commission; however, one must assume that in order for the Commission to make a ruling, it must have received such a request from a party or undertake the decision making process on its own accord. The statute also does not provide any time frame within which a motion would be made or the Commission must make its determination.

obey a court order.³ In this case, the Commission has not yet issued any orders relevant to the discovery (or document production) dispute that is the subject of the Motion.

Regulation 103-846(A) provides that “[i]rrelevant, immaterial, or unduly repetitious evidence shall be excluded”, but the Company has not argued the statements or documents are irrelevant or immaterial. The Motion does briefly mention the Company would be prejudiced by the inclusion of the testimony. However, as it should, the Company’s rebuttal testimony provides its counterarguments and spends considerable time addressing its concerns about the potential prejudicial effect of ORS’ testimony.⁴ The Company request to strike ORS testimony and exhibits, while including its own criticisms of that testimony, may prohibit the development of a full and complete record in this matter. These counterarguments are ones the Commission can and should consider because “the Commission sits as the trier of the facts, akin to a jury of experts.” *S. Bell Tel. & Tel. Co. v. Pub. Serv. Comm’n*, 270 S.C. 590, 597 (1978). However, “[b]efore the Commission reaches a decision it must weigh the testimony and all other evidence.” *Id.* at 598. In order to do that, a full record should be developed.

III. Exclusion of Testimony as a Sanction

In asserting the Commission could exclude witness testimony as a sanction, the Company also cites *Kramer v. Kramer*, 323 S.C. 212 (Ct. App. 1996), a Court of Appeals decision stemming from the Family Court of Greenville County. The Company’s Motion states *Kramer* holds that “trial courts can impose sanctions upon parties who violate [discovery rules], including the exclusion of witnesses”. The Company left out a crucial portion of this holding which renders it inapplicable to the facts of the present situation. The Court’s full finding in *Kramer* is as follows:

³ SCRCF Rule 37(b) is titled “Failure to Comply with Order” and paragraph (b)(2) “Sanctions by Court in Which Action Is Pending” states: If a party...fails to obey an order to provide or permit discovery...or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

⁴ However, note that in other pleadings, the Company states that it is not concerned with being treated unfairly by the Commission. See Applicant’s Return to Office of Regulatory Staff’s Motion for Leave to File Testimony and Exhibits Under Seal at p.8.

“[i]n order to encourage compliance with discovery rules, trial courts can impose sanctions upon parties who violate them, including the exclusion of witnesses **whose identities have been withheld.**” *Kramer* at 217 (Emphasis added). The court in *Kramer* cites three other cases supporting this finding. All of these cases involve instances where a party either did not reveal the identity of witnesses in an answer to an interrogatory or otherwise did not timely provide their names to opposing counsel. That is not the case here and therefore the holding in *Kramer* is not applicable.

Further, the next sentence in the *Kramer* opinion states “[e]xclusion of a witness, however, is a severe sanction which should be imposed only after the court inquires into (1) the type of witness involved; (2) the content of the evidence to be presented; (3) the nature of the failure to identify the witness; and (4) the degree of surprise to the other party.” As noted in factor (3), the court emphasized the nature of the failure to reveal the witness’ identity, which again, is not relevant to the current issues before the Commission. Therefore, contrary to the Company’s statements, there is no precedent for excluding witness testimony as a sanction here.

For the reasons stated herein, the Department respectfully requests the Commission deny the Company’s Motion to Strike the testimony of ORS.

Respectfully submitted,

S.C. DEPARTMENT OF CONSUMER AFFAIRS

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